IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 22, 2006 Session

HRP OF TENNESSEE, INC., d/b/a HOSPITAL RESOURCE PERSONNEL v. STATE OF TENNESSEE, DEPARTMENT OF EMPLOYMENT SECURITY

Appeal from the Tennessee Claims Commission
No. 68236 Robert Fellman, Administrative Law Judge

No. E2005-01176-COA-R3-CV - FILED JUNE 28, 2006

The issue in this case is whether a nurse registry business that places nurses at medical facilities on a temporary, as-needed basis, owes unemployment insurance taxes on the nurses' earnings. The determinative factor is whether the nurses are independent contractors or employees pursuant to T.C.A. § 50-7-207. Unemployment insurance taxes were assessed against the nurse registry business and paid under protest. The nurse registry business petitioned the Tennessee Claims Commission for a refund. An administrative law judge ruled that the nurses were independent contractors and ordered a refund. The State of Tennessee, Department of Employment Security appealed. After careful review, we hold that the nurses were independent contractors and that the nurse registry business was not required to pay unemployment insurance taxes related to services the nurses performed. Accordingly, we affirm the judgment of the administrative law judge and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Claims Commission Affirmed; Cause Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and D. MICHAEL SWINEY, JJ., joined.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; and Michael B. Schwegler, Assistant Attorney General, Nashville, Tennessee; for the appellant State of Tennessee, Department of Employment Security.

William A. Harris and Zachary H. Greene, Chattanooga, Tennessee, for the appellee, HRP of Tennessee, Inc., d/b/a Hospital Resource Personnel.

OPINION

I. Background

The appellee in this case, HRP of Tennessee, Inc., d/b/a Hospital Resource Personnel ("HRP"), is a Tennessee corporation that operates as a nurse registry business, providing both licensed practical nurses and registered nurses to hospitals, nursing homes, and other health care facilities in the Chattanooga area, on a temporary, as-needed basis. HRP functions as intermediary between nurses desiring job placement through its service and medical facilities requiring temporary nursing assistance. HRP has operated this placement business since June of 1989. Between 1989 and the mid-1990's, HRP's contract with the nurses on its registry stated in relevant part as follows:

> All individual contractors for HRP Nursing Services will be able to:
>
> 1. Read, understand and conform to all policies for individual Nursing Services departments where they are assigned.
> 2. Read, understand and conform to all HRP policies.
> 3. Perform clinical duties proficiently, that the nursing educational system requires.
> 4. Maintain good working relations with hospital staff while performing in a professional manner.
> 5. Document all work done as required by the hospital and legal systems.
> 6. HRP will require you, as independent contractors, to report to all hospitals assigned to you, no later than 15 minutes prior to the assigned shift. If you are required to stay later than the scheduled shift, please notify HRP as records must be amended for billing purposes.
> 7. Incidents occurring at hospitals are required to be reported to HRP after appropriate forms are filled out at the hospital. HRP will pursue the matter according to proper channels of authority.

In January of 1990, the appellant Tennessee Department of Employment Security ("the Department") determined that the nurses on HRP's registry were employees of HRP, rather than independent contractors. In accordance with this determination, the Department concluded that HRP was obligated to pay unemployment insurance taxes relative to the monies earned by the nurses, pursuant to T.C.A. §50-7-401. Consequently, taxes were assessed against HRP with respect to services provided by nurses who were placed at medical facilities by HRP. These assessments totaled $29,142.34 and represented taxes for the third and fourth quarters of 1989, for all of 1990, and for the first, second, and third quarters of 1991. HRP paid these taxes under protest and subsequently petitioned the Tennessee Claims Commission for a total refund, arguing that the nurses

in its registry pool were independent contractors and therefore, HRP was not required to pay unemployment insurance taxes with respect to the nurses' work.

The case was transferred to the Administrative Procedures Division of the Office of the Secretary of State by agreement and assigned to an administrative law judge. After a hearing on September 9, 2003, the administrative law judge entered his order granting HRP's request for a refund of the assessed taxes based upon a finding that the nurses employed by HRP were independent contractors and not HRP's employees. This appeal followed.

II. Issue

The sole issue presented for our review is whether the trial court erred in concluding that HRP was not subject to unemployment insurance tax assessment for services performed by the nurses on its registry because the nurses were independent contractors rather than employees of HRP.

III. Standard of Review

The appellate review of an administrative law judge's decision is governed by the Uniform Administrative Procedures Act, codified at T.C.A. §4-5-101, *et seq. Freedom Broad. of Tenn., Inc. v. Tennessee Dep't. of Revenue*, 83 S.W.3d 777, 780 (Tenn. Ct. App. 2002) (citing *Sanifill of Tenn., Inc. v. Tennessee Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 809 (Tenn. 1995)). As set forth at T.C.A. §4-5-322(h), the Act provides in pertinent part the following:

> The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (5)(A) Unsupported by evidence that is both substantial and material in the light of the entire record.

An agency's findings of fact may not be reviewed *de novo* by the appellate courts, and the latter should not substitute its judgment for that of the agency; however, the "construction of a statute and application of the law to the facts is a question of law that may be addressed by the courts." *Sanifill,* 907 S.W.2d at 810. The facts in the matter now before us are apparently not in dispute. The question of whether HRP is subject to unemployment insurance taxation under relevant statutory authority is determined by an application of the law to the facts and is, accordingly, a question of law.

IV. Employee vs. Independent Contractor

The parties agree that the controlling statute in this case is T.C.A. §50-7-207 which defines "employment" for the purpose of determining which workers provide services subject to the state unemployment insurance tax. Subsection (a) of this statute states:

> (a) DEFINITION OF "EMPLOYMENT." For purposes of this chapter and subject to the special rules contained in subsection (e), and the definitions contained in subsection (f), "employment" means service that meets all of the following conditions:
> (1) It is within any category of "included service" as listed in subsection (b);
> (2) It is not within any category of "excluded service" as listed in subsection (c); and
> (3) It is within any category of "Tennessee service" as listed in subsection(d).

It appears that HRP does not disagree that subsections (2) and (3) above are satisfied with regard to the services provided by the nurses on its registry. However, HRP disputes that such services qualify as "included service" under subsection (1). As noted, such "included service" is listed at subsection (b) which states in pertinent part, as follows:

> (b) "INCLUDED SERVICE." For purposes of this section, "included service" means any of the following:
>
> . . .
>
> (2) Subject to the other provisions of this section, service performed after December 31, 1977, including service in interstate commerce, by:
>
> . . .
>
> (B) Any individual who, under the usual common-law rules applicable in determining the employer/employee relationship, has the status of an employee;
>
> . . .

> (e) SPECIAL RULES. The following rules shall govern for purposes of this section:
>
> (1) Service performed by an individual shall be deemed to be included service for purposes of this section irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the administrator that:
>
> (A) Such individual has been and will continue to be free from control and direction in connection with the performance of such service, both under any contract for the performance of service and in fact;
>
> (B) Such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; *and*
>
> (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

T.C.A. §50-7-207(emphasis added)

The final three quoted subsections, (A), (B), and (C), constitute what is frequently referred to as the "ABC Test." All three elements of the test must be met:

(A) the nurses must have been free of HRP's control and direction in connection with the performance of services;
(B) nurse services must have been performed outside HRP's business; and
(C) the nurses must have been customarily engaged in an independently established profession or business of the same nature as that involved in the services performed.

The Department contends that HRP has failed to satisfy parts A and C of this test and, therefore, assessment of unemployment insurance taxes against HRP was proper.

A. Control and direction

First, the Department argues that the nurses on HRP's placement registry were subject to both direct and vicarious control by HRP and, as a result, the requirement of part A of the test has not

been met. The Department asserts that HRP exerted vicarious control over the nurses because, while the health care facilities for which the nurses performed service exercised supervisory control over the nurses, the source of such control was the relationship between HRP and the nurses. The Department further argues that HRP exerted direct control over the nurses, as demonstrated by the following:

1) HRP contracted separately with the nurses and client medical facilities, and the fees paid by the client medical facilities covered both HRP's service fee and the nurses' wages.

2) HRP independently decided which nurse would be offered which assignment.

3) HRP affiliated nurses were paid by HRP at rates set by the client medical facilities, and the nurses could not negotiate their compensation with the client medical facilities.

4) Nurses had to obey at least some of HRP's instructions.

5) HRP had the power to terminate its relationship with the nurses on its registry without incurring any liability.

6) Nurses could choose work assignments only in conformity with HRP-created schedules.

7) Nurses were required to sign HRP-generated paperwork and use HRP's time sheets.

8) The contract between HRP and client medical facilities compelled HRP to exercise the supervisory functions of screening nurses, carrying professional liability insurance on behalf of its nurse agents, and evaluating nurses' performance reviews.

9) Nurses often wore HRP name tags that made them appear to be agents of HRP.

10) HRP was contractually entitled to notice of any extra hours worked.

11) The contractual terms governing the relationship between the nurses and HRP required the nurses to "read, understand and conform to all HRP policies," appear "no later than 15 minutes prior to the assigned shift," and report incidents at client medical facilities to HRP so that HRP could "pursue the matter according to proper channels of authority."

12) HRP offered the nurses bonuses and did not require that the nurses have malpractice insurance before beginning employment.

The Department cites various cases from other jurisdictions in support of its argument that each of these twelve assertions shows that HRP exerted control over the nurses on its registry and, therefore, failed to meet the requirement of part A of the ABC test. We do not find this authority to be persuasive and the Department cites no Tennessee authority for its argument. Based upon our

construction of the language of part A, we are compelled to disagree with the position urged by the Department.

It is a fundamental rule of construction that the intent of a statute "is to be ascertained primarily from the natural and ordinary meaning of the language used, when read in the context of the entire statute, without any forced or subtle construction to limit or extend the import of the language." *R.E. Worrall v. Kroger Co.*, 545 S.W.2d 736, 738 (Tenn. 1977). Although the Department contends that "[p]art A requires that workers be free of *all* control and direction" by HRP, in actuality part A provides that a service performed by a worker is an included service subject to the unemployment insurance tax unless the worker "has been and will continue to be free from control and direction in connection with *the performance* of such service ..." (emphasis added). The Department presents no evidence that the nurses were controlled either vicariously or directly in the performance of their duties as nurses while working at the various medical facilities to which they were assigned.

Our conclusion that the nurses were independent contractors rather than HRP employees is further consistent with the Tennessee Supreme Court's decision in *Beare Company v. State*, 814 S.W.2d 715 (Tenn. 1991). Under the facts in that case, the Beare Company provided refrigerated warehouse storage service for food shippers. A portion of food products received by Beare for storage in its warehouses had to be unloaded from trucks and stacked on pallets before being stored. Beare hired part time workers known as "hoppers" to accomplish that task. Although a Beare employee directed the order in which the trucks were unloaded, otherwise the work performed by the hoppers required little or no supervision. Usually, the truck hoppers were paid directly by the carriers and about ten per cent of the time the hoppers were paid directly by Beare on behalf of the carriers. Although the Department argued that the hoppers were employees of Beare for purposes of employment security taxes, the Court disagreed and found that the hoppers were independent contractors instead. The Court reached this conclusion under analyses of both the common law and the ABC test in T.C.A. §50-7-207(e)(1). With specific regard to part A of the ABC test, the Court stated as follows:

> [T]he record is clear that Beare exercised virtually no control over the hoppers, other than to tell them which trucks to unload. The hoppers received no other instructions from Beare. They learn how to stack and use pallett dividers from other hoppers. Although the hoppers work during the normal business hours of Beare, Beare does not set a time limit to load or unload each truck. Beare is only interested in whether or not the food is properly stacked, but it does not supervise or direct the hopper while he stacks it. The hoppers are essentially free from control of Beare and, therefore, satisfy the "A" prong of the test.

Beare Company, 814 S.W.2d at 719.

It is apparent from this analysis that the control envisioned under part A is control of the actual job duties undertaken by the worker. Just as the hoppers were not instructed by Beare as to how to stack and use pallette drivers, the nurses on HRP's registry were not instructed by HRP as to how to care for patients or how to perform other tasks associated with their jobs as nurses at the various medical facilities to which they were assigned. Just as Beare did not set a time limit for the hoppers to load or unload trucks, HRP did not determine the daily work routine of nurses once their work day at a client medical facility began. And finally, although Beare was concerned that the food was properly stacked by the hoppers and HRP was concerned that the nurses on its registry "perform clinical duties proficiently" and "[m]aintain good working relations with hospital staff while performing in a professional manner," neither Beare nor HRP supervised or directed the subject workers while the workers performed their assigned jobs.

Under both the plain meaning of the statutory language and Tennessee case law, we find no merit in the Department's argument that HRP failed to satisfy part A of the test.

B. Performed outside business

It is undisputed that HRP has satisfied this element of the test.

C. Independent business or profession

Next, the Department contends that HRP has failed to satisfy part C of the ABC test because there was no proof that each individual nurse listed in HRP's registry had his or her own independently established trade, occupation, profession or business. In this regard, the Department notes that no evidence was presented that any of the nurses possessed a business license, had a separate business premises or home office, were covered by malpractice insurance other than that provided by HRP, or had other clients or had worked for other employment agencies. The Department argues that "a worker's customary engagement in an independently established trade, occupation, profession or business, contemplates that the worker has a proprietary interest in his or her own ongoing commercial enterprise, not merely licensure."

While we do not necessarily disagree that mere licensure is insufficient to satisfy part C of the ABC test, we do disagree that part C is not satisfied absent proof that the worker "has a proprietary interest in his or her own ongoing commercial enterprise." We are compelled to this conclusion by the following language from *Beare* affirming the finding that the workers in that case satisfied the requirements of part C:

> [W]e agree with the Commissioner's finding regarding clause (C) that the hoppers are "customarily engaged in an independently established trade, occupation, profession, or business...." T.C.A. §50-7-207(e)(1)(C). We concur with the following explanation provided by the Commissioner in this regard:

> As to test C, hoppers arrive at Beare when they want to - they have no set day or hours when they must be on duty. They are free to load or unload trucks at other businesses without interference from Beare. Neither Beare nor other such companies have any control of where or when the hoppers work. It is the hopper who chooses where he goes and when. Because of this freedom, it is found that the hopper is engaged in a business independent of Beare.

Beare Company, 814 S.W.2d at 719-720.

Just as the hoppers in *Beare* arrived when they wanted and had no set day or hours when they had to be on duty, the nurses on the registry were not required by HRP to accept work with any of HRP's client medical facilities nor did HRP require the nurses to accept employment on any particular work shift or work a certain number of hours. And just as the hoppers in *Beare* were free to load or unload trucks at other businesses without Beare's interference, the nurses listed on HRP's registry were free to contract with any medical facility directly and independent of HRP, and the nurses were also free to contract with and participate in other registry services. In this regard, we note the following testimony of Thomas Vinson Blanton, Jr., who served as president of HRP during the time relevant to this case:

> Q Did HRP prohibit these contract nurses from contracting with any other entity?
>
> A No, and I will tell you that most - - 98 percent of the nurses that are - - that do agency work, have more than one. They should and they do.
>
> Q You say more than one agency?
>
> A More than one agency. In other words, they contract with other agencies also.
>
> Q Like HRP?
>
> A Right.
>
> . . .
>
> Q I guess you consider yourself an employment agency; right?
>
> A No.

Q Okay. What?

A It's more of a registry. An employment agency - - the way I understand, an employment agency is where I'm trying to find - - like you would come to me if you didn't have a job and you wanted me to find you a job. That's not what this is. 95-plus percent of nurses that work in agencies, as I said, work for other agencies or have full-time jobs. The majority have full-time jobs at hospital XYZ, and they might want to earn a little extra money, so they will contract out their services, say, on a weekend if they work weekdays.

Q So would you say a registry agency?

A I don't - - just registry or an agency. Nurse registry I think would be what you would call it.

Q Okay. You talked about nurses being employed with other agencies?

A Yeah, being affiliated with other agencies.

Q Can you name any competitor registry agencies in this area?

A Oh, gosh, yeah.

Q So there's a lot of them?

A A lot. There is a lot.

Q And a nurse could be on every one of those?

A If they wanted to be, yes, and they are.

HRP, like Beare, had no control over where or when the nurses on its registry worked and that decision was left to the nurses themselves. Hence, the nurses listed on HRP's registry were customarily engaged in an independently established profession and satisfied part C of the test.

V. Conclusion

For the foregoing reasons, we hold that HRP satisfied all three requirements of the ABC test and, therefore, the administrative law judge correctly ruled that the nurses on HRP's placement registry were independent contractors, and not employees of HRP. Accordingly, we affirm the

judgment of the administrative law judge and remand for further action consistent with this opinion. Costs of appeal are adjudged against the appellant State of Tennessee, Department of Employment Security.

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SHARON G. LEE, JUDGE